No. 20374

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF FOR THE APPELLANT

JOHN W. DOUGLAS,
Assistant Attorney General,

RICHARD L. McVEIGH,
United States Attorney,

MORTON HOLLANDER,
WALTER H. FLEISCHER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

CITATIONS

Cases:

Cases: (continued) Page

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20374

UNITED STATES OF AMERICA,

Appellant

v.

HOWARD C. HAYES, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

The United States brought this action in the United States District Court for the District of Alaska, seeking to recover $30,691.67, plus accrued interest, from the guarantors of a loan made by the Reconstruction Finance Corporation to two corporations which defaulted on their note. Jurisdiction of the district court was founded on 28 U.S.C. 1345. After trial, the district court entered judgment dismissing the action with prejudice. The jurisdiction of this Court on appeal rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action brought by the United States against the guarantors of a note payable to the Small Business Administration as assignee of the Reconstruction Finance Corporation.[1/] The note was executed in the principal amount of $49,200, by Hayes and Whiteley Enterprises, a co-partnership consisting of Chichago Corporation and Gastineau Corporation, and interest was payable at the annual rate of 5 per cent (R. 4, 17-18). The note was secured by a first mortgage upon timber land and chattels owned by Hayes and Whiteley Enterprises. The principal officers of the two Corporations, Messrs. Howard C. Hayes and Stanwood P. Whitele and their wives, "unconditionally" guaranteed to R.F.C. "the due and punctual payment when due, whether by acceleration or otherwise... of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor" (R. 4, 17-18).

Soon after the loan was made, Hayes and Whiteley Enterprises became insolvent, and later bankrupt, and was placed in the hands of a trustee (Tr. 17). It also defaulted on the R.F.C. note (R. 18). Small Business Administration brought suit, and in April 1958 obtained a judgment totalling (principal, interest,

---

1/ The functions of the Reconstruction Finance Corporation were transferred to the Small Business Administration by 1957 Reorganization Plan No. 1, effective June 30, 1957, 22 Fed. Reg. 4633, 71 Stat. 647.

and other various sums) $48,983.72, and a foreclosure decree (R. 18, Exh. F).[2/]

The guarantors of the loan were not joined as defendants in that suit. The Trustee was served with process, entered a general appearance, admitted service of process and filed a waiver of time for further pleading and trial. The two corporations comprising Hayes and Whiteley Enterprises were served separately, and defaulted (Exh. F). Mr. Hayes stated that he had knowledge of these proceedings in the bankruptcy court (Tr. 25). However, neither he nor Mr. Whiteley undertook to defend the suit in the bankruptcy court.[3/] Pursuant to the foreclosure decree, the property owned by Hayes and Whiteley was sold. During the time that the property had been under the control of the Trustee, it had depreciated in value, through vandalism and theft, and the property did not satisfy the judgment in full. On June 30, 1958, the United States Marshal filed in court a Return on Execution recording that the judgment in favor of Small Business Administration was unsatisfied in the sum of $30,691.67 (Exh. E).

In August 1962, a second suit was brought by the United States against the guarantors of the note in the United States

---

2/ The judgment also provided that interest was to run until the judgment was paid (Exh. F).

3/ Mr. Whiteley claimed that he did not bid at the foreclosure sale, because he had been led to understand by an R.F.C. employee that he would not be held liable on his guarantee (Tr. 30). He did not, and could not, suggest that there would have been any defense to the foreclosure suit itself.

istrict Court for the District of Alaska. The Complaint averred hat the judgment in the suit on the note remained unpaid in the mount of $30,691.67, plus accrued interest in the amount of 7,811.00. The Complaint asked for judgment in the amount of he principal and accrued interest, with additional interest to un from the date of the filing of the suit (R. 3). The guaran-ors' Answer admitted the execution of the Note by Hayes and hiteley Enterprises and the unconditional Guarantee, and that ayes and Whiteley Enterprises had defaulted on the note and a udgment had been obtained by Small Business Administration (R.). The Answer, however, generally denied the allegation in the omplaint that the judgment remained unpaid in amount of 30,691.67 plus interest. The guarantors did not allege that he judgment had been paid, and indeed admitted that they had aid no part of it (R. 5, 10).

At the trial, the Government urged that the judgment against ayes and Whiteley Enterprises was prima facie evidence of the iability of the guarantors (Mr. and Mrs. Hayes and Mr. and Mrs. hiteley), and also sought to show the amount owing on the udgment by introducing a Statement of Account certified "to e a true and accurate statement of account as reflected by the fficial records maintained in the Office of Fiscal Operations" f the Small Business Administration, by the Head of the Loan ccounting Branch of that agency. The district court refused o admit the Statement of Account into evidence, reasoning that

.t was not a record of any act, transaction, occurrence, or :vent, so as to be admissible under 28 U.S.C. 1732, and that .t was not properly authenticated so as to be admissible as a Government record under 28 U.S.C. 1733 (Tr. 6-7).

The Government then attempted to have an S.B.A. official who was in the courtroom testify and authenticate a revised statement of Account. The district judge also excluded this testimony, on the ground that at the pre-trial conference the United States had stated that it would call no witness, and would not be permitted to go beyond the scope of the pre-trial order (R. 20-21), even to the extent of calling a witness simply for the purpose of authenticating a document (Tr. 8-11).

The district court ruled that the burden of proving the amount payable was on the United States, because "evidence of the amount of payment on the note guaranteed by the defendants and on the judgment secured by plaintiff's predecessor on said note was chiefly or entirely within the control of the plaintiff" (R. 33). The court then found that "plaintiff failed to sustain the burden of proof as to the amount due on the indebtedness guaranteed by the defendants," and entered judgment dismissing the action.

SPECIFICATION OF ERRORS

1. The district court erred in ruling that under the facts and circumstances of this case, the United States had the burden

f proving the amount due on the judgment obtained on the in-
ebtedness guaranteed by the defendants.

2. The district court erred in "finding" that evidence
f the amount of payment on the judgment was chiefly or entirely
ithin the control of the United States.

SUMMARY OF ARGUMENT

This case turns upon whether a noteholder who has obtained judgment against his principal debtor must, in a subsequent uit against guarantors of the note who were not party to the irst suit, sustain the burden of proving the amount of the till unpaid judgment. We submit that the district court ommitted plainly reversible error in holding, in this case, hat there was such a burden on the United States.

First, the district court erred in ruling that such a bur-
en must be imposed on the United States because evidence of
ayment "was chiefly or entirely within the control" of the
nited States. Of course, as the district court noted, a party
ith principal knowledge of a fact must bear the burden of
roving its existence or non-existence. 9 Wigmore on Evidence
2486 (3d Ed. 1940). But here evidence of whether the judgment
gainst Hayes and Whiteley Enterprises had been paid was just
s easily accessible to Mr. and Mrs. Hayes and Mr. and Mrs.
hiteley as it was to the United States. Presumably the judg-
ent could have been paid by the defendants, or by the Trustee
f their bankrupt corporations. Defendants admit that they

made no payments on the judgment (R. 5, 10). It was also just as easy for them to discover what payments, if any, the Trustee of their own corporations had made as it was for the United States. All that was required of them was to look at the file of the Bankruptcy court, or to correspond with the Trustee.

Second, it is almost universally held that a judgment obtained in a suit against a principal debtor is prima facie evidence of the liability of his guarantor or surety in a subsequent suit. E.g., Moses v. United States, 166 U.S. 571, 600; Lake County v. Massachusetts Bonding & Ins. Co., 75 F. 2d 6, 8 (C.A. 5), followed, 84 F. 2d 115 (C.A. 5); Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc., 92 F. 2d 657 (C.A. 3); Commonwealth to the Use of Ulshofer v. Turner, 340 Pa. 468, 17 A. 2d 352, 354 (1941).

It is particularly appropriate that this rule be applied in this case, where the guarantors are the principal officers (and their wives) of the corporations against whom the judgment was entered in the first suit, cf. Empire Steel Co. of Texas v. Omni Steel Corp., 378 S.W. 2d 905, 911-12 (Tex.Civ.App. 1964) (writ ref. n.r.e.), and where the guarantors were aware of the foreclosure proceedings (Tr. 25) brought against their own corporation.

Third, it is well-settled that "a judgment is presumed to remain in force until the contrary appears." Daniel Drug Co. v. Collier Drug Co., 207 Ala. 308, 92 So. 895 (1922). In the

n unpaid, and, as a general rule, the burden of proving payment a judgment rests squarely upon the defendant. E.g., Swartz v. yton, 325 Mass. 747, 92 N.E. 2d 263 (1950).

Inasmuch as a) the judgment against Hayes and Whiteley Enterses is prima facie evidence of the liability of Mr. and Mrs. es and Mr. and Mrs. Whiteley, the guarantors, and b) that gment is presumed to remain unpaid until the defendant guarans show otherwise, there is no doubt that the district erred in ding that the United States had the burden of making a negative wing that the judgment in favor of the Small Business Administation had not been paid. Although the defendants were free to er proof of payment of the judgment, they did not (and, of rse, could not) attempt to do so. It follows that the district rt had no legal basis on which to absolve the guarantors of ir plain contractual obligation, freely undertaken, and should e entered judgment for the United States. Compare United State Buffalo Coal Mining Co., 343 F. 2d 561 (C.A. 9), rehearing ied, 345 F. 2d 517.[4/]

The district court correctly rejected several affirmative deses raised by appellees. Defendants' contention that the suit barred by laches or by the Alaska Statute of Limitations was perly rejected on the basis of United States v. Summerlin, 310 . 414, 416; see also United States v. 93 Court Corp., 350 F. 2d (C.A. 2). Defendants also claimed that the property involved depreciated in value because of the wilful failure of R.F.C. care for it. The district court, however, found (R. 32) that e proof fails to establish that RFC was in possession or con- l of the property or had a duty to protect and preserve it" yes and Whiteley Enterprises was placed into receivership at request of a private creditor, not RFC Tr. 24) and that "There no evidence of a willful act or willful failure to act on the t of RFC causing deterioration, waste or loss of the property." ally, defendants claimed that an RFC employee, Mr. Hugo Guenthe, icated to them that they would not be held liable on their rantees. The district court found (R. 32) that "The proof fail establish the Hugh (sic) Guenther had authority to orally rese defendants from the guaranty or that he did so."

ARGUMENT

THE DISTRICT COURT ERRED IN PLACING THE BURDEN OF PROVING THE AMOUNT DUE ON A JUDGMENT ON THE UNITED STATES, THE PLAINTIFF IN THIS ACTION AGAINST THE GUARANTORS OF THE NOTE ON WHICH THE JUDGMENT WAS OBTAINED.

As earlier stated, this case turns on whether the United States had the burden of proving the amount due on a judgment against Hayes and Whiteley Enterprises in a subsequent suit against the guarantors of the note, Messrs. Hayes and Whiteley, and their wives. Without attempting to rule on the question of whether a judgment obtained against a debtor is prima facie evidence of the liability of the guarantors, the district court held that the United States had the burden of proving non-payment of the judgment, because, it thought, evidence of payment or non-payment was "chiefly or entirely within the control" of the United States. As demonstrated below, the basis for the district court's conclusion is unsound, and a judgment against a principal debtor in circumstances such as these is prima facie evidence of his unpaid debt in a later suit against his guarantor.

A. EVIDENCE OF WHAT PAYMENTS WERE MADE ON THE JUDGMENT WAS NOT CHIEFLY OR ENTIRELY WITHIN THE CONTROL OF THE UNITED STATES.

The district court's findings of fact and conclusions of law do not indicate why it thought that evidence of what payments were made on the judgment against Hayes and Whiteley Enterprises was peculiarly within the control of the United States. It is

rue that a party having peculiar knowledge of a fact often is eld to have the burden of proving its existence or non-existnce,[5] but it is perfectly clear here that evidence of what ayments had been made on the judgment was just as easily accesible to the defendant guarantors as it was to the United States. ll defendants had to do was to look at the files of the Bankuptcy court (another division of the United States District ourt for the District of Alaska),[6] or to correspond with the rustee of their own corporations. The Trustee has a statutory bligation to "keep records and accounts showing all amounts nd items of property received and from what sources, all amounts xpended and for what purposes and all items of property disposed f." 11 U.S.C. 75(a)(5). He also must furnish all such inforation to any party in interest who requests it. 11 U.S.C. 5(a)(10). Thus the bankruptcy file, which was just as accesible to defendants as to the United States, contained all the ecessary information respecting payment of the judgment in uestion.

In addition, even were it assumed that the United States omehow had easier access to information of this nature than efendants, defendants could obtain the information with minimal

---

/ E.g., Erving Paper Mills v. Hudson-Sharp Machine Co., 332 . 2d 674, 678 (C.A. 7); Fleming v. Ashbaugh, 158 F. 2d 826, 28 (C.A. 9); 9 Wigmore on Evidence § 2486 (3d Ed. 1940).

/ Indeed, it would have been proper for the district court o take judicial notice of such files. See Freshman v. Atkins, 69 U.S. 121, 124; Cf. Lowe v. McDonald, 221 F. 2d 228, 230-31 C.A. 9).

difficulty through discovery procedures. Defendants recognized this, and filed interrogatories asking the United States to state what payments had been made, and the dates of payment (R. 6-7). The answers to the interrogatories, of course, revealed that the only payments on the note after the judgment was entered in April 1958 consisted of one small payment by the Trustee, plus the proceeds of the foreclosure sale (R. 8-9).

Defendants cannot both use the discovery procedures set forth in the Federal Rules of Civil Procedure to receive simple information and at the same time claim that the burden of proving the existence of such information lies upon the United States because it has peculiar knowledge of the facts. The doctrine relied upon by the district court is not applicable to alter the usual burden of proving simple facts as easily discoverable as those involved here. Tortora v. General Motors Corp., 373 Mich. 563, 130 N.W. 2d 21, 24 (1964).

B. THE JUDGMENT OBTAINED AGAINST THE PRINCIPAL DEBTOR, HAYES AND WHITELEY ENTERPRISES, IS PRIMA FACIE EVIDENCE OF ITS LIABILITY IN A SUBSEQUENT ACTION AGAINST ITS UNCONDITIONAL GUARANTORS.

The great majority of jurisdictions passing on the question have held that a judgment obtained against a principal debtor is prima facie evidence of his liability in a suit against his guarantor or surety. E.g., Moses v. United States, 166 U.S. 571; Drummond v. Prestman, 12 Wheat. (25 U.S.) 515, 519; Lake County v. Massachusetts Bonding & Ins. Co., 75 F. 2d 6, 8 (C.A. 5), followed 84 F. 2d 115 (C.A. 5); Massachusetts Bonding & Ins. Co. v.

obert E. Denike, Inc., 92 F. 2d 657, 658 (C.A. 3); Commonwealth o the Use of Ulshofer v. Turner, 340 Pa. 468, 17 A. 2d 352 1941); L. B. Price Mercantile Co. v. Redd, 231 S.C. 446, 99 S.E. d 57 (1957); Carey v. Maryland Cas. Co., 90 R.I. 430, 158 A. 2d 83, 885 (1960) (dictum); Cf. Stearns, Law of Suretyship (Elder's ev. 1951) § 9.31; contra, United States v. Maryland Cas. Co., 04 F. 2d 912 (C.A. 5) (applying Alabama law).

Indeed, the exact question presented here has been decided y several state courts in circumstances indistinguishable from hose present here. In Home Ins. Co. of New York v. Savage, 231 o. App. 569, 103 S.W. 2d 900, 901 (1937), the court set forth he precise issue and its proper resolution (emphasis added):

> The next error urged is the ruling . . . . that plaintiff might prove the amount of damages due under the bond, by the introduction in evidence of the record default judgment against Savage. No other evidence tending to establish the amount of damages due plaintiff from these two sureties was offered. Defendants claim that in this action plaintiff sought a money judgment against them and should have been required, in this trial, to prove the amount of damages due; and that introduction of the record judgment obtained by default of the principal was not the proper method of proving it. When plaintiff sued the principal and his sureties in this action, and the principal defaulted, the judgment rendered against the principal was admissible in evidence against the sureties to establish the default and fix the measure of damages; and such record is prima facie proof thereof.

Accord: Charleston & W.C.R. Co. v. Robert G. Lassiter & o., 208 N.C. 209, 179 S.E. 879 (1935); Massachusetts Bond & Ins. o. v. Central Finance Corp., 124 Colo. 379, 237 P. 2d 1079, 081 (1951).

A small minority of cases, to be sure, disagree with the rule stated above, and hold that a judgment entered against the principal debtor in a suit in which he has defaulted (rather than a suit the debtor has defended) is not prima facie evidence of his liability in a suit against his guarantors or sureties. Sutter v. Hill, 101 N.E. 2d 502, 504 (Ohio 1950); Monmouth Lumber Co. v. Indemnity Ins. Co., 21 N.J. 439, 122 A. 2d 604 (1956) (acknowledging adherence to the "minority" view); Restatement of the Law, Security §139. For reasons explained below, the majority position is far sounder. In any event, the rationale of the minority (and Restatement) view is completely inapplicable to the present case.

The rationale of the minority position is that a judgment confessed by the debtor is not as probative evidence of his debt as a judgment after a trial in which he contested liability, because an insolvent debtor might not raise meritorious defenses to a suit in which he apparently has no financial stake. However, in the present case the judgment was confessed, not by an insolvent debtor, indifferent to his guarantor's fate, but by a Trustee in bankrupty required by statute to "examine all proofs of claim and object to the allowance of such claims as may be improper." 11 U.S.C. 75(a)(8); Controller of California v. Lockwood, 193 F. 2d 169, 172 (C.A. 9); 3 Collier on Bankruptcy § 57.17 [2.3]. Presumably the Trustee did not object to this Small Business Administration claim because he found it

eritorious. Thus, the judgment against Hayes and Whiteley Enerprises is probative evidence of its debt, and should be reated as prima facie evidence of that debt in this suit against he guarantors. It should also be remembered that the guarantors n this case are the principal officers and their wives of the ebtor corporations. It is hardly unfair to regard the judgment ntered against Hayes and Whiteley Enterprises as prima facie vidence of its liability in a later suit against Messrs. Hayes nd Whiteley. Cf. Empire Steel Co. of Texas v. Omni Steel Corp., 78 S.W. 2d 905, 911-12 (Tex.Civ.App. 1964) (writ ref. n.r.e.).

Moreover, the majority rule that a judgment against the ebtor is prima facie evidence of the guarantors' liability, ven if by default, is completely sound and should be followed ere, if this Court regards it necessary to choose between the wo views. We submit that for two reasons it would be anomalous ot to consider a judgment on a note in a suit against the ebtor as prima facie evidence of his liability in a subsequent uit against the guarantors. First, if the debtor were to apear as a witness in a suit against his guarantors, and admit hat he owed the amount alleged to be due, surely this would be rima facie evidence of his debt, and would support a judgment gainst the guarantors. His admission of his debt by confessing judgment or defaulting in a suit against him should be acorded at least equal weight. See Drummond v. Prestman, 12 heat. (25 U.S.) 515, 519.

Second, it should be noted that if instead of first suing the debtor corporations comprising Hayes and Whiteley Enterprises, the United States had brought suit directly against the guarantors, to establish a prima facie case it would have had to do no more than present the note, for "it is an established rule of law that presentation of an instrument [in a suit against a guarantor] is prima facie evidence that the debt therein set forth is unpaid, and the burden of proof is thereupon shifted to the defendant." Lurie v. Newhall, 333 Ill. App. 173, 76 N.W. 2d 813, 815 (1947); accord: Burns v. Cole, 117 Iowa 262, 90 N.W. 731, 732 (1902).[7] It is inconceivable that the noteholder would worsen his position by obtaining a judgment against his debtor.

Finally, if the judgment against Hayes and Whiteley Enterprises is prima facie evidence of its liability in the suit against the guarantors, it also is prima facie evidence of the amount of the liability, subject to the affirmative defense of payment. Home Ins. Co. of New York v. Savage, supra, 103 S.W. 2d at 901; Charleston & W.C.R. Co. v. Robert G. Lassiter & Co., supra; Lake County v. Massachusetts Bonding & Ins. Co., supra, 84 F. 2d at 116, n. 2.[8] This follows from the well-settled principle that a judgment is presumed to remain in force until

---

7/ The Guaranty expressly states that the "Reconstruction Finance Corporation shall not be required, prior to any such demand on, or payment by, the undersigned [guarantors], to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor..." (R. 4).

8/ This is also implicit in Moses v. United States, 166 U.S. 571, 600.

the contrary appears. Daniel Drug Co. v. Collier Drug Co., 207 Ala. 308, 90 So. 895 (1922); C.J.S., Judgments § 559. A defendant against whom a judgment is properly offered in evidence has the burden of proving its payment. Swartz v. Clayton, 325 Mass. 747, 92 N.E. 2d 263 (1950); Bonadonna v. Bonadonna, 322 S.W. 2d 925 (Mo. 1959).

In this case, the defendant guarantors did not attempt to present evidence of payment of the judgment against Hayes and Whiteley Enterprises, nor did they even plead payment. Thus the United States, by introducing the judgment on the note which defendants "unconditionally" guaranteed, established a prima facie case to which no rebuttal was made. It follows that the district court erred in not entering judgment for the United States, in the requested amount.[9/] Defendants' guaranty is a clear contractual obligation which should be enforced.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the district court should be reversed, with instructions to enter judgment in favor of the United States in the amount of $30,691.67, plus accrued interest.

Respectfully submitted,

JOHN W. DOUGLAS,
Assistant Attorney General,

RICHARD L. McVEIGH,
United States Attorney,

MORTON HOLLANDER,
Walter H. Fleischer WALTER H. FLEISCHER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

DECEMBER 1965

9/ The complaint, of course, does not ask recovery in the full amount of the judgment, $48,983.72, because the judgment obviousl was partially satisfied by the foreclosure sale (Exh. E, R. 8-9).
(footnote continued on page 17)

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

Walter H. Fleischer

WALTER H. FLEISCHER,
Attorney,
Department of Justice,
Washington, D. C. 20530.

9/ (footnote continued from page 16)
This does not relieve defendants of their burden of proving payment; the fact that the United States did part of defendants' work for them by admitting partial payment cannot relieve defendants of the burden of showing what further payments, if any, there were on the judgment.